Supreme Court, U. S.
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No. 80-169

IN THE

# Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.

*Petitioner,*

*v.*

WILLIAM MITCHELL

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTION PRESENTED

When an employee's discharge has been upheld in "final and binding" arbitration and the employee seeks to relitigate his discharge with his employer in the federal courts under § 301 of the **Labor Management Relations Act** on the ground that the union failed him in its duty of fair representation, did not the court below err in determining that the suit was governed by the six-year statute of limitations for actions on contracts and, therefore, was not barred by the ninety-day limitation on actions to vacate arbitration awards?

## PARTIES IN THE COURT OF APPEALS

The parties in the court of appeals were United Parcel Service, Inc. (petitioner in this Court), William Mitchell (respondent in this Court), and Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (co-appellee with petitioner in the court of appeals).

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM 1980

UNITED PARCEL SERVICE, INC.

*Petitioner,*

*v.*

WILLIAM MITCHELL

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United Parcel Service, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 3, 1980.

## OPINIONS BELOW

Neither the opinion of the United States District Court for the Eastern District of New York (A1) [1] nor the

1. References herein to "A" pages are to pages in the appendix to this petition.

opinion of the United States Court of Appeals for the Second Circuit (A5), reversing the opinion of the district court, has been officially reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1980. (A14) United Parcel Service filed a timely petition for rehearing which was denied on May 7, 1980. (A16-A17)

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 301(a) of the **Labor Management Relations Act of 1947,** 29 U. S. C. § 185(a), provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 12 of the **United States Arbitration Act,** 9 U. S. C. § 12, provides in pertinent part as follows:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

Section 7511(a) of the **New York Civil Practice Laws and Rules,** N. Y. Civ. Prac. Law § 7511(a) (McKinney), provides as follows:

> When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

Section 213 of the **New York Civil Practice Laws and Rules,** N. Y. Civ. Prac. Law § 213 (McKinney) provides in pertinent part as follows:

> The following actions must be commenced within six years: . . .
>
> (2) An action upon a contractual obligation of liability express or implied, except as provided in Article 2 of the Uniform Commercial Code . . .

## STATEMENT OF THE CASE

Respondent William Mitchell was employed by petitioner United Parcel Service, Inc. ("UPS") as a car washer at its Staten Island, New York facility. He was discharged by UPS on January 13, 1977 for falsifying his time cards and claiming payment for hours which he did not work.

Mitchell, a member of the Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (the "Union"), denied the charges against him and requested the Union to file a grievance against UPS on his behalf contesting the discharge. UPS and the Union are parties to a collective bargaining agreement which governs the bases upon which employment may be terminated and contains a grievance and arbitration procedure for the resolution of disputes covered by the agreement.

Pursuant to the collective bargaining agreement, Mitchell's grievance was submitted to a panel of the Joint Atlantic Area Parcel Grievance Committee (the "Joint Panel"). Mitchell was represented by the Union at a full hearing on the grievance before the Joint Panel.

On February 16, 1977, the Joint Panel issued an award holding that UPS had not violated the agreement by discharging Mitchell and denied the grievance. Under the terms of the collective bargaining agreement, the decision of the Joint Panel upholding the discharge is final and binding.

Seventeen months after the Joint Panel sustained the discharge, Mitchell instituted this suit pursuant to § 301(a) of the **Labor Management Relations Act of 1947**, 29 U. S. C. § 185(a) and **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554 (1976). The complaint alleged that UPS had discharged Mitchell in violation of the collective bar-

gaining agreement and that the Union had failed to represent him fairly in the grievance and arbitration process.

Under **Hines,** an employee may relitigate a contested discharge sustained by an arbitration decision only if he asserts both that the discharge was contrary to the collective bargaining agreement and that the union's breach of its duty of fair representation subverted the arbitration process.

**The Decision of the District Court**

The defendants moved for summary judgment in Mitchell's suit on the ground that the action was barred by the ninety-day statute of limitations for actions to vacate arbitration awards. N. Y. Civ. Prac. Law § 7511(a) (McKinney). Mitchell argued that the statute of limitations governing actions to vacate arbitration awards was not appropriate because the arbitration process was rendered ineffective by the union's misconduct.

The district court granted the defendants' motion for summary judgment and dismissed the complaint. It agreed that an action seeking reinstatement and damages following an adverse arbitration decision is properly characterized as a suit to vacate an arbitration award. The court reasoned that the relief sought had been denied in an award "issued as a result of a full-scale arbitration proceeding" and the effect of any judicial relief "would be to vacate the determination of the arbitrators."

The district court rejected the argument that the ninety-day statute of limitations was "too short" in view of the fact that the federal **Arbitration Act,** 9 U. S. C. § 12, likewise provides a three-month statute of limitations. It reasoned that the application of the ninety-day statute of limitations was consistent with the federal labor policy favoring relatively rapid resolution of labor disputes through final and binding arbitration.

**The Decision of the Court of Appeals**

On appeal, the court of appeals rejected the district court's characterization of the action as a suit to vacate an arbitration award. It held the ninety-day statute of limitations inapplicable to § 301 actions brought pursuant to **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 544 (1976), which permits a discharged employee to bring a § 301 action despite an adverse arbitration award where the union had breached its duty of fair representation in presenting the employee's grievance to the arbitrator. Rather, the court of appeals held that in such cases the six-year statute of limitations for contractual breaches, N. Y. Civ. Prac. Law § 213(2) (McKinney), was applicable. The court of appeals therefore reversed the district court's dismissal of the action.

## REASONS FOR GRANTING THE WRIT

**The Decision of the Court Below Rejecting the Limitation Period for Suits to Vacate Arbitration Awards in Favor of a Longer Period Raises an Important Question of Federal Labor Law and Threatens the Future Effectiveness of Arbitration as a Means of Resolving Labor Disputes.**

In reversing the district court's dismissal of Mitchell's action and holding that the limitation period was six years rather than ninety days, the court of appeals has contributed to a growing conflict among the lower federal courts as to the appropriate limitation period governing the timeliness of § 301 actions brought pursuant to **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 544 (1976).

The present unsettled state of the law has shaken the confidence of both employers and unions in the finality of arbitration awards,[2] and the prospect of arbitration awards remaining open for six years threatens to undermine the private dispute settlement machinery provided by collective bargaining agreements. Although there is not yet a conflict among the circuits, this extremely important issue of the appropriate statute of limitations for actions commenced pursuant to **Hines** should be resolved as soon as possible to insure continued reliance on arbitration by employers and unions in accordance with federal labor policy.

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2. A petition for writ of certiorari to the United States Court of Appeals for the Second Circuit on this question recently has been filed by the United Steelworkers of America to review the judgment in **Flowers v. Local 2602, United Steelworkers**, 2d Cir., — F. 2d —, (No. 80-7020) (March 24, 1980), *petition for cert. filed*, No. 80-26.

**A. The Decision Threatens Federal Labor Policy.**

Congress has placed its stamp of approval on contractual arrangements to resolve labor disputes [3] and this Court has affirmed the importance of arbitration as "a stabilizing influence" necessary to effectuate industrial self-government and labor peace.[4] Parties to collective agreements rely on the finality of arbitration as protection from litigation of labor disputes.

The bar to the finality of arbitration is lifted only when the process culminating in an arbitration award is fatally flawed, such as where the union's bad faith representation of the employee subverts the arbitration process. **Hines**, 424 U. S. at 571-572.

These limitations on the finality of arbitration awards increase the willingness of employers, employees, and unions to rely on arbitration because they provide a guarantee that arbitration, while "binding and final" and not subject to reexamination through appeals or separate lawsuits, nevertheless will satisfy the purposes for which the parties adopted it. So long as challenges to arbitration must be promptly brought, these limitations do not undermine the strong federal policy favoring arbitration as a means of resolving labor disputes.

By contrast, a six-year statute of limitations on actions which, however the court of appeals may characterize them, permit relitigation of matters which had

3. Section 203(d) of the **Labor Management Relations Act, 1947**, 29 U. S. C. § 173(d) (1978) states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . ."

4. *See, e.g.*, **Steelworkers v. American Mfg. Co.**, 363 U. S. 564, 566 (1960); **Steelworkers v. Warrior & Gulf Co.**, 363 U. S. 574, 580, 581 (1960); **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554, 571 (1976).

been resolved by arbitration, takes away the principal benefits of arbitration as a means of resolving labor disputes—speed, economy, and fairness.

The loss of speed and economy is patent. Under the court of appeals' decision, simply by alleging the absence of fair representation, an employee can impose on employer and union alike the cost of extensive litigation years after both believe the issue has been finally resolved. The application of a six-year limitation period to **Hines** actions will undermine the stability of the private settlement machinery and increase the possibility of industrial strife. If arbitration awards remain open to relitigation for six years, parties to the labor contract will be unsure as to the meaning of its terms. Contract negotiations will become more difficult if the correct interpretation of existing agreements remains unclear. Grievances that are not finally resolved for six years may create industrial unrest, and disaffected employees have more time to bring suit to harass both employer and union. On a more practical, every day level, every time the employer wins an arbitration, neither the union nor the company can safely destroy its files for six years; the union must remain prepared to prove that it fairly represented its member, and the company that its actions which led to the arbitration were proper.

Most important, the decision of the court of appeals takes a substantial element of fairness out of the arbitration of grievances. If the employer loses the arbitration, it has ninety days to challenge the award. By contrast, if it prevails in the arbitration, it must be prepared to relitigate the issue for six years. For the employee, the decision is final after three months unless he chooses to attack it; for the employer it remains subject to attack for six years.

The absence of arbitral finality will place a severe strain on management-union relations. The myriad dis-

putes which the parties have in the past been able to resolve in arbitration expeditiously and finally will now be suspended in limbo for six years while aggrieved employees decide whether to challenge the award in court.[5] Such arbitrations are not limited to relatively simple discharge claims. They may involve a class of grievants, and the results may directly affect the employment or seniority status of hundreds, and perhaps thousands, of employees. Under the court of appeals' decision, management and the union will no longer be able to obtain an expeditious and final resolution of such disputes.

Since, under this decision, arbitration will henceforth retain its quality of expeditious finality only when the employer loses, it is reasonable to expect that many employers will abandon or sharply curtail labor arbitration as a means of resolving disputes. As a result, labor disputes that traditionally have been decided by arbitration will increasingly be fought out in the streets, through strikes and other work disruptions, and in the courts.[6]

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5. For example, in this case plaintiff Mitchell was discharged on January 13, 1977 and the discharge was affirmed by the arbitration panel on February 16, 1977. Under the Panel's decision, the merits of that discharge would be open to challenge until February 16, 1983.

6. This petition has been written on the assumption that the same statute of limitations applies to § 301 **Hines** suits whether the defendant is the employer or the union. In fact, there are strong reasons to apply to the employer the state statute of limitations governing suits to vacate arbitration awards, even if the same statute does not apply to the union. After all, it is the union's failure of fair representation and not the employer's which removes the finality from the arbitration award. The union should be aware of the conduct which constitutes failure of fair representation; the employer cannot be.

Moreover, as this case illustrates, the two claims have entirely different bases and arose at different times: the claim against the

**B. The Court of Appeals Misread This Court's Hines Decision.**

The court of appeals relied heavily on this Court's decision in **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554 (1976), in rejecting the district court's characterization of § 301 suits following arbitration awards as actions to vacate those awards, to which the New York statute of limitations for such actions must be applied. This Court gave every indication in **Hines**, however, that the district court's characterization was proper. This Court in **Hines** did not describe the issue before it as dependent upon the underlying contractual protections against wrongful discharge. Instead, the majority opinion, as well as the concurring and the dissenting opinions, all described the issue as one of determining the conditions under which the finality provisions of the arbitration provisions of the collective bargaining agreement must be enforced. 424 U. S. at 560-61, 567, 571, 572 (concurring opinion of Mr. Justice Stewart); 575 (dissenting opinion of Mr. Justice Rehnquist). The issue, then, is whether and under what conditions the arbitration agreement will be enforced, and not whether the courts will enforce contractual provisions against wrongful discharge.

Similarly, in **Humphrey v. Moore**, 375 U. S. 335 (1964), on which **Hines** was partly based, this Court phrased the issue as "whether the Kentucky Court of Appeals properly enjoined implementation of the decision of

6. (Cont'd.)

employer arose out of an alleged wrongful discharge which occurred at some time before the arbitration, whereas the claim against the union did not arise out of the discharge itself, but rather out of the alleged failure of the union, at some later date, adequately to represent the employee in the arbitration proceedings in which he grieved the earlier claim against the employer.

a joint employer-employee committee purporting to settle certain grievances . . . ." 375 U. S. at 336. Thus, the decision of the court of appeals, like the similar decision of the Court of Appeals for the Sixth Circuit in **Smart v. Ellis Trucking Co.**, 580 F. 2d 215 (6th Cir. 1978), *cert. denied*, 440 U. S. 958 (1979), reflects a misreading of this Court's decision in **Hines** which threatens widespread damage to labor-management relations.

Indeed, logically the case must be viewed as most analogous to an action to vacate an arbitration award, in order to avoid the conflicting burdens that would otherwise be imposed on an employer. Of course if the decision reached in the subsequent § 301 action is the same as that reached by the arbitrators, the employer's duties are clear; but if a contrary order is issued, and the arbitral decision remains outstanding on the theory that the § 301 action was not brought to vacate it, an employer could legitimately complain that he is faced with conflicting legal rights and responsibilities.

### C. The Lower Courts Are in Conflict and Confusion.

The issue of the appropriate state limitation period governing the timeliness of a § 301 action brought pursuant to **Hines** has arisen frequently since the case was decided, but it has not been resolved by this Court.[7]

In characterizing Mitchell's suit as a contract action rather than as an action to vacate an award, the court below disagreed with the New York federal court decisions holding the shorter statute of limitations applicable

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7. **International Union, United Auto Workers v. Hoosier Cardinal Corp.**, 383 U. S. 696, 704-705 (1965) holds only that ". . . since no federal provision governs, . . . the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations."

to **Hines** actions.[8] Numerous courts in other jurisdictions also have applied relatively short statutes of limitations governing suits to vacate arbitration awards.[9]

The only other court of appeals to consider the timeliness of a **Hines** action, the Sixth Circuit, rejected the shorter limitation period for actions to vacate an award in favor of a three year period for personal injury suits in **Smart v. Ellis Trucking Co.**, 580 F. 2d 215 (6th Cir. 1978), *cert. denied*, 440 U. S. 958 (1979). The Second and the Sixth Circuit decisions thus seek to avoid the inevitable consequence of the policy that actions to overturn awards must be taken expeditiously.

The existence in forty-two states of a statute of limitations for actions to vacate awards,[10] coupled with the cur-

8. *See, e.g.*, **Baker v. R. H. Macy & Co.**, 77 C 912 (E. D. N. Y. Jan. 19, 1978); **Barbarino v. Anchor Motor Freight, Inc.**, 421 F. Supp. 1003, 1006 (W. D. N. Y. 1976); *see also*, **Hanna Heating & A. C. Co. v. Sheet Metal Workers, Local Union No. 38**, 378 F. Supp. 1001, 1003 (S. D. N. Y. 1974).

9. *See, e.g.*, **Pizzuto v. Hall's Motor Transit Co.**, 409 F. Supp. 427 (E. D. Va. 1976) (Federal Arbitration Act's three-month limitation); **DeLorto v. United Parcel Service, Inc.**, 401 F. Supp. 408 (D. Mass. 1975) (Massachusetts' thirty-day limitation); **Lunceford v. Western Conference of Teamsters**, 87 LRRM 2011 (C. D. Cal. 1974) (California's 100-day limitation); **Elrod v. Western Conference of Teamsters**, 77 LRRM 2619 (C. D. Cal. 1971), *aff'd on other grounds* 85 LRRM 2189 (9th Cir. 1973), *cert. denied*, 416 U. S. 955 (1974) (California's 100-day limitation); **Howerton v. J. Christenson Co.**, 76 LRRM 2937 (N. D. Cal. 1971) (California's 100-day limitation). *See also*, **Local 800 v. Lakeshore Motor Freight Co.**, 102 LRRM 2046 (W. D. Pa. 1979) (Pennsylvania's three-month limitation); **UMW v. Jones & Laughlin Steel Corp.**, 378 F. Supp. 1206 (W. D. Pa. 1974) (Pennsylvania's three-month limitation); **Teamsters Local 249 v. Motor Freight Express, Inc.**, 356 F. Supp. 724 (W. D. Pa. 1973) (Pennsylvania's three-month limitation).

10. These statutes are collected in Appendix F to the petition for certiorari in **United Steelworkers v. Flowers**, No. 80-26 (U. S., filed July 7, 1980), which for the convenience of the Court, the

rent conflict among the lower federal courts, indicates the frequency with which this issue will continue to arise and the urgency of its prompt resolution.

## CONCLUSION

For the reasons set forth above, we respectfully urge that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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Dated: August 5, 1980

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10. (Cont'd.)
United Steelworkers has granted permission to be reprinted in the Appendix to this petition at p. A18. Suits to vacate awards under the **United States Arbitration Act**, 9 U. S. C. § 12, also must be brought within three months.

# Appendix

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 C 1547

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., et al.,

Defendants.

**MEMORANDUM AND ORDER**

SIFTON, *District Judge.*

Pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U. S. C. § 185, plaintiff, William Mitchell, instituted this action against his former employer and his union alleging wrongful discharge and inadequate representation. The suit was commenced over a year after a joint arbitration panel, convened in accordance with the collective bargaining agreement between defendants, issued an award sustaining Mitchell's discharge for allegedly falsifying his time cards. Mitchell seeks reinstatement and damages primarily on the ground that he was inadequately represented by his union before the joint grievance committee.

This case bears great resemblance to *Wallace v. AT&T*, 460 F. Supp. 755 (E. D. N. Y. 1978), in which

this Court dismissed a similar complaint as time barred under CPLR 7511(a). In *Wallace*, this Court determined that a suit seeking reinstatement and damages for allegedly wrongful discharge pursuant to an arbitration award is appropriately characterized as a suit to vacate the award and is, therefore, subject to the 90-day limitation period provided in the State's statute. Further, this Court held that in view of the inter-relationship between a Section 301 claim against an employer and an unfair representation claim against a union—both stemming from the allegedly wrongful discharge of an employee contrary to the terms of the collective bargaining agreement—both the unfair representation claim against the union and the improper discharge claim against the employer are properly governed by the same statute. A reexamination of *Wallace* suggests that these principles are equally applicable to the present case and that a similar result should obtain here.

This Court reaches the conclusion that summary judgment is appropriate despite the arguments set forth in plaintiff's brief which seek to have the Court distinguish or reconsider *Wallace*. First, Mitchell suggests that he is not seeking to vacate an arbitration award since a meaningful arbitration of his grievance never occurred. However, the failure to seek to vacate the award *in haec verba* cannot be determinative. The relief sought was expressly denied in an arbitration award issued as a result of a full-scale, arbitration proceeding. The effect of any grant of the relief sought by this Court would be to vacate the determination of the arbitrators.

Plaintiff additionally calls attention to a footnote in the Supreme Court decision of *UAW v. Hoosier Cardinal Corp.*, 383 U. S. 696, 707 n. 9 (1965), which states that "other questions would be raised if this case presented a state law characterization of a 301 suit that reasonably

described the nature of the cause of action, but required application of an unusually short or long limitation period." *Id.* note 9, at 707. In view of the three-month statute of limitations contained in the Federal Arbitration Statute, 9 U. S. C. § 12, it is at least questionable whether the Supreme Court would regard the New York limitation as "too short." Nor is it apparent what "other questions" would be raised by plaintiff in this case as a result of the application of the 90-day period, or why such questions should be resolved in plaintiff's favor. The policy favoring "relatively rapid disposition of labor disputes" recognized in *Hoosier Cardinal* combines in this case with the policy favoring arbitration as a means of securing a quick and final resolution of disputes in general. Accordingly, for the reasons set forth herein and in this Court's earlier opinion in *Wallace v. AT&T, supra,* defendants' motion for summary judgment is granted and the Clerk is directed to enter judgment dismissing plaintiff's complaint and to mail a copy of this opinion to counsel for all parties.

So Ordered.

Dated: Brooklyn, New York
October 23, 1979.

Charles P. Sifton
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 C 1547

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., et al.,

Defendants.

**JUDGMENT**

A Memorandum and order of Honorable Charles P. Sifton, United States District Judge, having been filed on October 25, 1979, granting defendants' motion for summary judgment, and directing the Clerk of Court to enter judgment dismissing plaintiff's complaint, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants; that defendants' motion for summary judgment is granted; and that judgment is hereby entered dismissing the complaint.

Dated: Brooklyn, New York
October 25, 1979

RICHARD H. WEARE
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 748—September Term, 1979
(Argued February 29, 1980 Decided March 3, 1980)
Docket No. 79-7803

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WILLIAM MITCHELL,
*Plaintiff-Appellant,*

—v.—

UNITED PARCEL SERVICE, INC., and DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177,
*Defendants-Appellees.*

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Before:

KAUFMAN, *Chief Judge,*
TIMBERS, *Circuit Judge,*
and WERKER, *District Judge.**

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Appeal from a judgment entered in the Eastern District of New York, Charles P. Sifton, *District Judge,* dismissing appellant's wrongful discharge complaint under § 301 of the Labor Management Relations Act as barred by the applicable New York statute of limitations.

Reversed and remanded.

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DAVID JAROSLAWICZ, New York, N. Y. (Ira Leitel, Carol Mellor, and Leitel and

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* Hon. Henry F. Werker, United States District Judge for the Southern District of New York, sitting by designation.

Jaroslawicz, New York, N. Y., on the brief), *for appellant Mitchell.*

M. DAVID ZURNDORFER, New York, N. Y. (Edward Silver, Mark L. Goldstein and Proskauer Rose Goetz & Mendelsohn, New York, N. Y., on the brief), *for appellee United Parcel Service, Inc.*

ALBERT S. PARSONNET, Newark, N. J. (Parsonnet, Duggan & Pykon, Newark, N. J., on the brief), *for appellee Department Store And Wholesale Drivers, Warehousemen And Helpers Local Union #177.*

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## OPINION

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TIMBERS, *Circuit Judge:*

Appellant William Mitchell appeals from a judgment entered in the Eastern District of New York, Charles P. Sifton, *District Judge,* dismissing appellant's wrongful discharge complaint under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185 (1976), as barred by the 90 day limitation period of § 7511 of the New York Civil Practice Law and Rules. The sole issue on appeal [1] is whether the district court erred in applying § 7511 to the instant action. We hold that it did.

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1. On appeal, appellees argue that the complaint was properly dismissed not only because it was time-barred, but also because appellant failed to exhaust his intra-union remedies and failed to raise a triable issue concerning appellee union's alleged breach of its duty of fair representation. The district court, however, did not address these issues. We therefore shall not address them for the first time here. Appellees are free to raise these issues in the district court on remand.

I.

Appellant, a member of Local Union #177 of the Department Store and Wholesale Drivers, Warehousemen and Helpers, was employed as a car washer by United Parcel Service, Inc. (UPS). In January 1977 appellant was discharged by UPS for dishonest acts, including "stealing time" and falsifying time cards. Appellant, who denied the charges against him, requested that his union file a grievance on his behalf contesting the discharge. As a member of Local Union #177, the terms of appellant's employment, including grounds for discharge and grievance procedures, were governed by the collective bargaining agreement between UPS and Local Union #177. Pursuant to this agreement, appellant's grievance was submitted to an arbitration panel—the Joint Atlantic Area Parcel Grievance Committee—for final resolution. Appellant was represented by his union at the hearing before this panel. On February 16, 1977 the arbitration panel denied appellant's grievance and upheld his discharge. According to the collective bargaining agreement, this decision was final and binding.

Seventeen months after the arbitral decision was rendered, appellant filed an action under LMRA § 301 [2] against his union and employer, alleging that UPS had breached the collective bargaining agreement by wrongfully discharging him and that Local Union #177 had breached its statutory duty of fair representation by the

2. Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185 (1976), provides in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

manner in which it handled appellant's grievance. The district court granted appellees' motions for summary judgment, dismissing the complaint on the ground that the action was barred by the 90 day limitation period set forth in § 7511.[3]

II.

There is no federal statute of limitations applicable to § 301 actions. As a result, the Supreme Court has held that "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, 383 U. S. 696, 704-05 (1966).

The district court, reasoning the "[t]he effect of any grant of relief . . . would be to vacate the determination of the arbitrators," held that the appropriate state statute of limitations was the 90 day period for "application[s] to vacate or modify an [arbitration] award". N. Y. Civ. Prac. Law § 7511 (McKinney 1963). We disagree. We hold that the limitation period which should have been applied is New York's six year period for actions alleging breach of contract. N. Y. Civ. Prac. Law § 213(2) (McKinney 1972).

In addressing the question of which New York statute of limitations should be applied in this case, we turn first to our decision in *Abrams v. Carrier Corp.*, 434 F. 2d 1234 (2 Cir. 1970), *cert. denied*, 401 U. S. 1009 (1971), where we held that:

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3. N. Y. Civ. Prac. Law § 7511 (McKinney 1963) provides that:

> "[a]n application to vacate or modify an [arbitration] award may be made by a party within ninety days after its delivery to him."

> "when a § 301 suit is brought against an employer alleging breach of the collective bargaining agreement in conjunction with a claim that the union breached its fair representation duty to pursue the employee's grievance, the same period of limitations should be applied to both claims. In the present case, the proper limitation period . . . is the six-year limitation set out in N. Y. CPLR § 213(2) for 'an action upon a contractual obligation or liability express or implied.'" *Id.* at 1252-53 (footnote omitted).

The factual claims underlying the § 301 action in *Abrams* were the same as those in the instant case, namely, a wrongful discharge by the employer coupled with a bad faith failure by the union to represent the employee adequately in discharge proceedings. The only difference between *Abrams* and the instant case is that here the employee was terminated after his grievance was rejected at arbitration, whereas in *Abrams* the grievance was not taken to arbitration. Citing this difference, appellees urge that we apply a different statute of limitations to the § 301 action in this case than the six year statute of limitations which we applied to the § 301 action in *Abrams*. We do not believe that such a fractionalized approach to § 301 wrongful discharge actions is warranted.

In determining which state statute of limitations to apply to a federal cause of action, courts must characterize the action in the manner that "best effectuates the federal policy at issue." *Butler v. Local Union 823, Int'l Brotherhood of Teamsters, etc.*, 514 F. 2d 442, 446 (8 Cir. 1975); *Charney v. Thomas*, 372 F. 2d 97, 100 (6 Cir. 1967). Appellees, pointing chiefly to the federal policy of according finality to arbitration awards and the federal goal of "relatively rapid disposition of labor disputes," *Int'l Union, etc. v. Hoosier Cardinal Corp.*,

*supra,* 383 U. S. at 707, argue that § 301 wrongful discharge actions commenced *after* arbitral decisions should be governed by the [redacted]y limitation period even if other § 301 wrong[redacted]ge actions are governed by another statut[redacted]

We do not a[redacted]eme Court has made it clear that the f[redacted] of according finality to arbitration awar[redacted]ld to the conflicting federal policy of providi[redacted]ployees with the opportunity "to secure individual redress for damaging failure of the employer to abide by the [collective bargaining] contract." *Hines v. Anchor Motor Freight, Inc.,* 424 U. S. 554, 571 (1976). In *Hines,* the Court granted discharged employees the right to sue employers and unions under § 301 despite the fact that the discharges had been upheld in "final" arbitration. In so doing, the Court rejected the argument that the federal policy of according finality to arbitration awards prevented employees from contesting arbitral decisions in § 301 actions. If we were to limit employee § 301 actions to a 90 day period following the adverse arbitral decision, we would severely restrict the Supreme Court's decision to allow employees to challenge arbitral decisions in conjunction with charges of bad faith representation by their union.

Furthermore, § 301 actions do not require the short limitation periods which are generally applied to assaults on arbitration awards. Contrary to the district court's characterization, § 301 actions cannot be equated to direct attacks on arbitration awards, nor can they be viewed as the same threat to the finality of arbitration awards. Arbitration awards cannot be vacated pursuant to § 301 on the ground that the arbitrators erred in their factual findings, or that the arbitrators reached faulty legal conclusions, or that the proceedings were flawed. *Hines*

*v. Anchor Motor Freight, Inc., supra,* 424 U. S. at 571; *Barbarino v. Anchor Motor Freight, Inc.,* 421 F. Supp. 1003, 1005 (W. D. N. Y. 1976). Rather, actions under § 301 are limited to those rare cases where the discharged employee can demonstrate *both* that the employer violated the collective bargaining agreement by discharging him *and* that the union violated its statutory duty by failing to represent him in good faith.

This is a heavy burden which the § 301 plaintiff must shoulder in order to overturn his discharge. There is no need to increase this burden by requiring the employee to commence the action in an unduly short period of time after his discharge. To require an employee—who is suddenly out of work—to obtain new counsel and file an action against his union and employer all within 90 days of his discharge strikes us as unwarranted.

Neither do we accept the argument that the 90 day limitation period is necessary to further the federal goal of relatively rapid disposition of labor disputes. The Court in *Hoosier, supra,* 383 U. S. at 707, indicated that a six year statute of limitations adequately furthered this federal labor policy. Far from suggesting that a 90 day period was needed to reach the goal of "relatively rapid" resolution of disputes, the *Hoosier* Court indicated that "unusually short" limitation periods—such as a 60 day New Mexico statute—should not be applied to § 301 actions. 383 U. S. at 707 n. 9.

Finally, we note that the characterization of § 301 actions such as the instant one as actions "to vacate arbitration awards" is not even conceptually sound. First, an action to vacate an arbitration award under New York law may not be instituted by discharged employees like appellant. *In re Soto,* 7 N. Y. 2d 397, 165

N. E. 2d 855, 198 N. Y. S. 2d 282 (1960). This difference is not an insubstantial one. While it may be reasonable to require the parties to a bargaining agreement (*i.e.*, the union and the employer) to contest an arbitral decision within 90 days, individual employees may well lack the resources to act as quickly. Second, a § 301 action is procedurally quite distinct from any action to vacate or modify an arbitration award. "Although the effect of a judgment for [the discharged employee] would be to nullify the arbitral decision, the § 301 action is 'independent' of the grievance process . . . . Indeed, such a claim can be brought even before an arbitral decision where a union refuses in bad faith to process a grievance." *Smart v. Ellis Trucking Co.*, 580 F. 2d 215, 219 (6 Cir. 1978), *cert. denied*, 440 U. S. 958 (1979); *see Hines v. Anchor Motor Freight, Inc., supra*, 424 U. S. at 567-68; *Vaca v. Sipes*, 386 U. S. 171 (1967).

Regardless of whether an arbitration decision has been entered, the issue in a § 301 wrongful discharge action remains whether the employer has breached the collective bargaining contract and whether a union breach of duty contributed to the contractual breach. *Hines v. Anchor Motor Freight, Inc., supra*, 424 U. S. at 568. The mere fact that an arbitral decision has been rendered during the course of the employee termination process does not convert the character of a § 301 action from an action for breach of contract to an action for vacating an arbitration award.

## III.

In summary, we reject the district court's characterization of the instant § 301 action as an action to vacate an arbitration award, and accordingly reverse the district court's dismissal of appellant's complaint as barred by § 7511. We hold that New York's six year limitation

period for contractual breaches, § 213(2), is applicable to LMRA § 301 actions by employees alleging wrongful discharge by the employer and breach of the fair representation duty by the union—regardless of whether the discharge was upheld by an arbitral panel or became final short of arbitration. Applying the six year limitation period of § 213(2) provides for relatively rapid disposition of labor disputes without undermining an employee's ability to vindicate his rights through § 301 actions. Thus, application of § 213(2) rather than § 7511 allows us to "best effectuate" the several federal policies implicated by actions under § 301.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of March, one thousand nine hundred and eighty.

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Present: HON. IRVING R. KAUFMAN
Chief Judge
HON. WILLIAM B. TIMBERS
Circuit Judge
HON. HENRY F. WERKER
District Judge

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79-7803

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WILLIAM MITCHELL
Plaintiff-Appellant

*v.*

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177
Defendants-Appellees.

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**JUDGMENT.**

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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This cause came on to be heard on the transcript of record from the United States District Court for the

Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of May, one thousand nine hundred and eighty.

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Present: HON. IRVING R. KAUFMAN
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. HENRY R. WERKER
District Judge

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79-7803

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WILLIAM MITCHELL
Plaintiff-Appellant,

*v.*

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177
Defendants-Appellees.

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**ORDER**

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A petition for a rehearing having been filed herein by counsel for the Appellee United Parcel Service, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of May, one thousand nine hundred and eighty.

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79-7803

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WILLIAM MITCHELL

Plaintiff-Appellant,

*v.*

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177

Defendants-Appellees.

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**ORDER**

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee United Parcel Service, Inc., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Circuit Judge

## STATE STATUTES OF LIMITATIONS *

### I. State Statutes of Limitations Governing Actions to Vacate Arbitration Awards.

Forty-two (42) states have enacted special statutes of limitations governing actions to vacate arbitration awards. In twenty-eight (28) of these states, the time limit prescribed is 90 days:

> Alaska Stat. § 9.43.120; Ark. Stat. Ann. § 34-522; Colo. Rev. Stat. § 13-22-214; Del. Code Ann. Tit. 10 § 5714; Fla. Stat. Ann. § 682.13; Idaho Code § 7-912; Ill. Ann. Stat. ch. 10 § 112 (Smith-Hurd); Ind. Code § 34-4-2-13; Kan. Stat. Ann. § 5-412(b); LSA-R. S. 9:4213 (West); Me. Rev. Stat. Ann. Tit. 14 § 5938; Minn. Stat. Ann. § 572.20; Nev. Rev. Stat. Ch. 38 § 145 (2); N. J. Stat. Ann. § 2A:24-7 (West); N. M. Stat. Ann. § 44-7-13; N. Y. CPLR § 7511 (McKinney); N. C. Gen. Stat. § 1-567.13; Ohio Rev. Code Ann. § 2711.13 (Page); Okla. Stat. Ann. Tit. 15 § 812 (West); 5 Pa. Cons. Stat. Ann. § 173 (Purdon); R. I. Gen. Laws § 10-3-15; S. C. Code § 15-48-130; S. D. Comp. Laws § 21-25A-25; Tex. Ann. Civ. St. art. 237; Utah Code Ann. § 78-31-18; Wash. Rev. Code Ann. § 7.04.180; Wis. Stat. Ann. § 788.13 (West); Wyo. Stat. § 1-36-114

In nine (9) states the time limit prescribed is less than 90 days:

> Ala. Code § 6-6-15 (10 days); Ariz. Rev. Stat. Ann. § 12-1506 (10 days); Conn. Gen. Stat. Ann. § 52-420 (West) (30 days); Hawaii Rev. Stat.

* Reprinted from Appendix F of the petition for certiorari in *United Steelworkers v. Flowers*, with permission of the Steelworkers.

§ 658-11 (10 days); Md. Stat. Ann. CJ § 3-224 (30 days); Mass. Gen. Laws Ann. ch. 150C § 11 (30 days); Mich. Gen. Court Rules 769 (20 days); Ore. Rev. Stat. § 33.310 (20 days); Vt. Stat. Ann. tit. 21 § 541 (30 days)

The statute of limitations for bringing an action to vacate an arbitration award is 100 days in California (Calif. Civil Proc. Code § 1288 (Deering)) and one year in New Hampshire (N. H. Rev. Stat. Ann. § 542.8). In Mississippi and Missouri an action to vacate an arbitration award must be brought at the next term of court after the award is made. (Miss. Code Ann. § 11-15-29; Mo. Ann. Stat. § 435.120 (Vernon)). In Georgia, after an award is returned to superior court and entered in its minutes, either party can, at the term to which said award is returned, suggest that the award is illegal (Ga. Code Ann. § 7-219).

**II. State Statutes of Limitations Governing Actions for Breach of Written Contract in the 42 States Listed in Part I.**

In each of the forty-two states with a special arbitration statute of limitations, the general statute governing actions for breach of written contract prescribes a much longer time period. The most common time limit for the latter is six years, found in twenty-four (24) of such states:

Ala. Code § 6-2-34; Alaska Stat. § 09.1.050; Conn. Gen. Stat. Ann. § 52-576 (West); Colo. Rev. Stat. § 13-80-110; Ga. Code Ann. § 3-705; Hawaii Rev. Stat. § 657-1; Me. Rev. Stat. Ann. tit. 14 § 752; Mass. Gen. Laws Ann. ch. 260 § 2; Mich. Stat. Ann. § 27A.5807(8); Minn. Stat. Ann. § 541.05; Miss. Code Ann. § 15-1-49; Nev. Rev. Stat. ch. 11 § 190.1; N. H. Rev. Stat. Ann. § 3508.4; N. J. Stat. Ann. § 2A:14-1

(West); N. M. Stat. Ann. § 37-1-3; N. Y. CPLR § 213(2); Ore. Rev. Stat. § 12.080; 42 Pa. Cons. Stat. Ann. § 5527; S. C. Code § 15-3-530; S. D. Comp. Laws § 15-2-13; Utah Code Ann. § 78-12-23; Vt. Stat. Ann. tit. 12 § 511; Wash. Rev. Code Ann. § 416.040; Wis. Stat. Ann. § 893.19 (West)

The statute of limitations for bringing an action for breach of a written contract is twenty years in Indiana (Ind. Code § 34-1-2-2); 15 years in Ohio (Ohio Rev. Code Ann. § 2305.06); and ten years in the following five states:

Ill. Ann. Stat. ch. 83 § 17 (Smith-Hurd); L. S. A.-C. C. art. 3544; Mo. Ann. Stat. § 516.110; R. I. Gen. Laws § 9-1-13; Wyo. Stat. § 1-3-105

The statute of limitations for bringing an action for a breach of a written contract is five years in the following five states:

Ark. Stat. Ann. § 37-209; Fla. Stat. Ann. § 95.11(2); Idaho Code § 5-216; Kan. Stat. Ann. § 60-511; Okla. Stat. Ann. tit. 12 § 95(1st) (West)

The statute of limitations for bringing an action for a breach of a written contract is four years in the following three states:

Ariz. Rev. Stat. Ann. § 12-550; Calif. Civil Proc. Code § 337; Texas Stat. Ann. Civ. St. § 5529

The statute of limitations for bringing an action for a breach of a written contract is three years in the following three states:

Del. Code Ann. tit. 10 § 8106; Md. Stat. Ann. CJ § 5-101; N. C. Gen. Stat. § 1-52

**III. State Statutes of Limitations Governing Actions for Breach of Oral Contract in the 42 States Listed in Part I.**

In *United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U. S. 696 (1966), this Court, in the context of a § 301 action which did not involve an arbitration award, upheld "borrowing" the state statute of limitations applicable to suits on oral (rather than written) contracts. In each of the forty-two states with a special arbitration statute of limitations, the statute governing actions for breach of an oral contract prescribes a much longer time period.

The statute of limitations for bringing an action for breach of an oral contract is six years in the following eighteen states:

> Ala. Code § 6-2-34; Alaska Stat. § 09.10.050; Colo. Rev. Stat. § 13-80-110; Hawaii Rev. Stat. § 657-1; Ind. Code § 34-1-2-1; Me. Rev. Stat. Ann. tit. 14 § 572; Mass. Gen. Laws Ann. ch. 260 § 2; Mich. Stat. Ann. § 27A.5807(8); Minn. Stat. Ann. § 541.05; N. H. Rev. Stat. Ann. § 508.4; N. J. Stat. Ann. § 2A:14-1 (West); N. Y. CPLR § 213(2); Ohio Rev. Code Ann. § 23.05.07 (Page); Ore. Rev. Stat. § 12.080; S. C. Code § 15-3-530; S. D. Comp. Laws § 15-2-13; Vt. Stat. Ann. tit. 12 § 511; Wisc. Stat. Ann. § 893.19

The statute of limitations for bringing an action for breach of an oral contract is five years in the following three states:

> Ark. Stat. § 37-213; Ill. Ann. Stat. ch. 83 § 16; Mo. Ann. Stat. § 516.120(1)

The statute of limitations for bringing an action for breach of an oral contract is four years in the following nine states:

Ariz. Rev. Stat. § 12-550; Fla. Stat. Ann. § 95.11(3); Ga. Code Ann. § 3-706; Idaho Code § 5-217; Nev. Rev. Stat. ch. 11 § 190.2; N. M. Stat. Ann. § 37-1-4; 42 Pa. Cons. Stat. Ann. § 5525; Tex. Stat. Ann. Civ. St. art. 5529; Utah Code Ann. § 78-12-25

The statute of limitations for bringing an action for breach of an oral contract is three years in the following eight states:

Conn. Gen. Stat. Ann. § 52-581; Del. Code Ann. tit. 10 § 8106; Kan. Stat. Ann. § 60-512; Md. Stat. Ann. CJ § 5-101; Miss. Code Ann. § 15-1-29; N. C. Gen. Stat. § 1-52; Okla. Stat. Ann. tit. 12 § 95(2d); Wash. Rev. Code Ann. § 4.16.080

In Louisiana and Rhode Island the statute of limitations for bringing an action for breach of an oral contract is ten years (L. S. A.-C. C. art. 3544; R. I. Gen. Laws § 9-1-13).

In Wyoming the statute of limitations is eight years (Wyo. Stat. § 1-3-105) and in California the statute of limitations is two years (Calif. Civil Prac. Code § 339).